MOTION FILED
SEP 10 2001

(5)

No. 01-46

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL MARITIME COMMISSION,
PETITIONER,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY,
RESPONDENT.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

CHARLES T. CARROLL, JR.
CARL LARSEN TAYLOR*
Wilcox, Carroll & Froelich, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

Attorneys for Amicus Curiae

**Counsel of Record*

September 10, 2001

17 pp

MOTION OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Waterfront Employers ("NAWE") is a nationwide association of private sector maritime terminal operators subject to regulation under federal law by Petitioner, the Federal Maritime Commission. Respondent, South Carolina State Ports Authority, is a maritime terminal operator arguing that it is not subject to the private complaint jurisdiction of the Federal Maritime Commission because it is entitled to sovereign immunity as a State agency. NAWE's members, being subject to federal regulation, have an interest in ensuring that federal regulation applies equally to all maritime terminal operators, including State agencies such as Respondent. NAWE filed a brief *amicus curiae* in the court below in support of the Federal Maritime Commission.

NAWE wishes to file the attached brief to argue that those who wrote and ratified the Constitution intended the sovereign immunity of the States to yield to the need for a uniform, national power over maritime commerce.

The Federal Maritime Commission has consented to the filing of NAWE's brief, and its letter of consent has been filed with the Clerk of this Court. South Carolina State Ports Authority has withheld consent, as it also did in the court below.

Wherefore, NAWE prays to be given leave to file the attached brief *amicus curiae*.

Respectfully submitted,

CHARLES T. CARROLL, JR.
CARL LARSEN TAYLOR *
Wilcox, Carroll & Froelich, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

Attorneys for Amicus Curiae

* *Counsel of Record*

September 10, 2001

QUESTIONS PRESENTED

Whether the moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

Whether Congress has intended to provide a federal forum for the adjudication of private domestic and foreign complaints against States that discriminate in the operation of their maritime ports.

Whether it is within the power of Congress under Article I to prevent discrimination in the operation of State-owned maritime ports by authorizing private adjudication before the Federal Maritime Commission.

Whether, in any event, it is within the power of Congress under the Equal Protection Clause of the Fourteenth Amendment to prevent discrimination in the operation of State-owned maritime ports by authorizing private adjudication before the Federal Maritime Commission.*

---

* In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief and that no person or entity other than the named *amicus* party has made a monetary contribution to the preparation or submission of this brief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations	2
II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process	7
III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders	8
IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users	9
CONCLUSION	10

TABLE OF AUTHORITIES

CONSTITUTION — Page

Article I 8
Fourteenth Amendment 9

CONSTITUTIONAL HISTORY

Benjamin Harrison (Governor of Virginia)

Letter to Thomas Jefferson, dated April 16, 1784, J. Boyd (ed.), 7 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1953) 3

Thomas Jefferson

Letter to James Monroe, dated June 17, 1785, J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) 2

Letter to Edward Carrington, dated August 4, 1787, J. Boyd (ed.), 11 THE PAPERS OF THOMAS JEFFERSON 678 (Princeton Univ. Press 1955) 6

James Madison

"Vices of the Political System of the United States," dated April 1787, P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 166 (Univ. of Chicago Press 1987) 5

George Washington

Letter to James Warren, dated October 7, 1785, P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) 3

TABLE OF AUTHORITIES—Continued

Page

"Proceedings of Commissioners to Remedy Defects of the Federal Government," dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/annapoli.htm 5

"Resolution of the General Assembly of Virginia," dated January 21, 1786.DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. Facsimile available at www.yale.edu/lawweb/avalon/const/const03.htm 4

CASES

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2000) 9
California v. United States, 320 U.S. 577 (1944) .. 7
United States v. Lopez, 514 U.S. 549 (1995) 8

STATUTES

46 U.S.C. App. § 1701(1) 7
46 U.S.C. App. § 1701(4) 7

LEGISLATIVE HISTORY

53 Cong. Rec. 8276 (1916) 7

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTRODUCTION

This case presents for the first time a clash between State sovereign immunity and the moving force behind the Constitution: the need for uniformity in maritime commerce. Between 1781 and 1787, States with maritime ports discriminatorily denied the use of those ports to the maritime commerce of other States and of England, France, and Holland. The Constitutional Convention was called to restrain this maritime trade war, which threatened the unity and peace of this new nation. This clash of principles is of paramount importance because it gave us the Constitution. Such a clash deserves the attention of this Court.

More is at stake here than one instance of alleged maritime discrimination by South Carolina. Twenty-one other States supported South Carolina as *amici curiae* in the court below. The widespread State participation in this case adds to the propriety of Supreme Court review at this time.

INTEREST OF THE *AMICUS CURIAE*

The interest of the National Association of Waterfront Employers as *amicus curiae* is described in the motion for leave to file that accompanies this brief.

SUMMARY OF ARGUMENT

The maritime ports of the United States are points of entry and exit for the ocean commerce of the nation as a whole. The ports are limited in number and serve large areas of the nation that have no other means of ocean access. A State can have sovereign immunity in the operation of maritime ports within its borders only if the constitutional structure gives to

each maritime State a measure of sovereignty over the ocean commerce of the nation as a whole, an untenable result. The Founders intended in the constitutional structure to preserve State sovereignty, but not over maritime commerce.

Congressional power over maritime commerce, including its starting and ending points, is plenary. The court below concedes that Congress could operate the maritime ports directly. It follows that the States may operate maritime ports only with the consent of Congress and under such conditions as Congress may impose.

ARGUMENT

I. The moving force behind the Constitution was the need to constrain States with maritime ports from using those ports to discriminate against the maritime commerce of citizens of other States and of foreign nations.

The Founders regarded the maritime competition between the States after the Revolutionary War as the greatest threat to the prosperity and even the survival of the United States. In 1784 Thomas Jefferson succeeded Benjamin Franklin as America's ambassador to France. From that vantage point Jefferson saw the harm that the States were doing to themselves and to each other in their competition for trade. In 1785 he wrote to James Monroe:

> You see that my primary object in the formation of treaties is to **take the commerce of the states out of the hands of the states**, and to place it under the superintendence of Congress, so far as the imperfect provisions of our constitution will admit, and until the states shall by new compact make them more perfect. I would say then to every nation on earth, __ by treaty __, your people shall trade freely with us, & ours with you, paying no more than the most favoured nation, **in order to put an end to the right of individual states** acting by fits

> and starts **to interrupt our commerce or to embroil us with any nation.**

Letter from Thomas Jefferson to James Monroe dated June 17, 1785, printed in J. Boyd (ed.), 8 THE PAPERS OF THOMAS JEFFERSON 231 (Princeton Univ. Press 1953) (JEFFERSON PAPERS) (emphasis added). Later that year, George Washington wrote:

> [W]e have abundant reason to be convinced, that the spirit for Trade which pervades these States is not to be restrained; it behooves us then to establish just principles; and this, any more than other matters of national concern, cannot be done by thirteen heads differently constructed and organized. The necessity therefore, of a controuling power is obvious; and why it should be withheld is beyond my comprehension.

Letter from George Washington to James Warren dated October 7, 1785, printed in P. Kurland (ed.), 1 THE FOUNDERS' CONSTITUTION 161 (Univ. of Chicago Press 1987) (FOUNDERS' CONSTITUTION).

In early 1784, the Governor of Virginia, Benjamin Harrison, had "anxiously" written to Jefferson, who was then representing Virginia in the Congress, about the trade problem:

> I am anxious to hear whether the other States have followed our example in giving powers to Congress so to regulate the trade of the whole United States as to make effectual oppositions to the restrictions of Great Britain. . . . I am much at a loss to assign a good reason for the refusal of any State so coming into the measure as every man of Sense must see that no effectual opposition can be made individually and that without one takes place immediately it will be hereafter very difficult to force great Britain into measures that may be reciprocally advantageous.

Letter from Harrison to Jefferson dated April 16, 1784, 7 JEFFERSON PAPERS 102.

In 1786, Virginia took the lead. On January 21 of that year the General Assembly of Virginia passed a resolution calling for a uniform system of commerce:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at the Internet site of the Avalon Project at Yale Law School, www.yale.edu/lawweb/avalon/const/const03.htm.

The Virginia Resolution led to a meeting in Annapolis, Maryland on September 11-14, 1786, attended by delegates from New York, New Jersey, Pennsylvania, Delaware, and Virginia. The Annapolis delegates were empowered only to make recommendations on the commerce problem, but they decided "that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other

parts of the Federal System." "Proceedings of Commissioners to Remedy Defects of the Federal Government" dated September 14, 1786. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (Government Printing Office 1927), House Document No. 398. A facsimile is available at www.yale.edu/lawweb/avalon/annapoli.htm. The Annapolis delegates recommended that Congress call a convention of all the States. *Id.*

Preparing himself for the Convention, James Madison in April 1787 drew up a list of the "Vices of the Political System of the United States." 1 FOUNDERS' CONSTITUTION 166. This remarkable document reveals that the States, in their competition for the maritime commerce of the warring European Powers, had broken the treaty of peace with Britain, the treaty of friendship with France, and the treaty of commerce with Holland. Madison feared that this "frequent violation of the law of nations" could eventually cause "the greatest of public calamities," war with all of the Powers. He wrote:

> 3. Violations of the law of nations and of treaties.
>
> . . . [N]ot a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.
>
> As yet foreign powers have not been rigorous in animadverting on us. This moderation cannot however be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring upon the whole.

> 4. Trespasses of the States on the rights of each other.
>
> These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports—of Maryland in favor of vessels belonging to her own citizens—of N. York in favor of the same.

1 FOUNDERS' CONSTITUTION 167.

Jefferson continued to urge, as he had in 1785, that "the commerce of the states [be taken] out of the hands of the states." Writing from Paris during the Constitutional Convention, he said: "My general plan would be to make the states one as to everything connected with foreign nations, and several as to everything purely domestic. . . . [The] greatest defect [of our government] is the imperfect manner in which matters of commerce have been provided for." Letter from Jefferson to Edward Carrington dated August 4, 1787, 11 JEFFERSON PAPERS 678.

It seems clear that the Founders would be astonished and dismayed to learn from the case now before this Court that State sovereignty is being used to impair the methods chosen by the Federal Government to regulate maritime commerce. Jefferson's call "to make the states as one" in maritime commerce leaves no room for State sovereign immunity over maritime trade. Maritime ports belong to the nation as a whole. The States that choose to own and operate maritime ports do so in public trust for the benefit of all. That trust is part of the original understanding. The court of appeals was wrong to make State-owned maritime ports less subject to the public trust than ports that are privately owned.

II. Congress has chosen to encourage the foreign maritime commerce of the United States by prohibiting disparate treatment in the operation of maritime ports and by establishing a simple and uniform regulatory process.

Congress has established "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. App. § 1701(1). Congress has rejected eighteenth century mercantilism in favor of "a greater reliance on the marketplace." 46 U.S.C. App. § 1701(4). There is no place in the Congressional scheme for substantive governmental control of the nation's maritime economy by the States.

To accomplish its objectives, Congress has said that States choosing to operate maritime ports must do so under the rules applicable to private operations. As the House Manager said in the debate leading to passage of the Shipping Act of 1916, "[i]f they do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." 53 Cong. Rec. 8276 (May 16, 1916). The question to the House Manager spoke of "municipal wharves," but this Court has determined that the Congressional Record exchange and the Shipping Act encompass all "public owners of wharves and piers," including those of the States. *California v. United States*, 320 U.S. 577, 585-86 (1944).

The court below held the States to be immune, because of their sovereignty, from private process to enforce the Shipping Act before the Federal Maritime Commission. The court acknowledged that its decision might impede "maritime efficiencies" and produce "economic advantage," but held the concept of State sovereign immunity to be constitutionally more important than the free and uniform flow of the nation's maritime commerce. Petition Appendix at 24a. The court's

holding is at odds with our constitutional history, which teaches that the States yielded to the federal government all sovereignty over the maritime commerce of the United States.

III. If the federal government has exclusive sovereignty over the maritime commerce of the United States, then the federal government may preclude the States from exercising any "economic advantage" by State ownership of the maritime ports within their borders.

State ownership of maritime ports is a throwback to the discredited mercantilist theory of the eighteenth century. The States have no constitutional "right" to exercise separate sovereignty over the maritime ports of the United States by owning them. The court below acknowledged that "if Congress so chose it could regulate all matters affecting ocean-borne commerce." Petition Appendix at 23a. The court of appeals cited Article I of the Constitution and this Court's decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995), which it read as holding that the "Commerce Clause allows direct regulation of the channels of interstate commerce." Petition Appendix at 23a.

Maritime ports are channels of interstate commerce. If Congress has the power under Article I to take direct control of them, then Congress has the lesser-included power of permitting State ownership of maritime ports subject to whatever conditions Congress may impose, including the Shipping Act requirement that the States answer complaints of discrimination filed by port users before the Federal Maritime Commission.

IV. In any event, the Fourteenth Amendment gives Congress the power to require the States to answer complaints of disparate treatment by port users.

Congress has clearly expressed an intent make the States answer to private complaints of disparate treatment in the operation of their maritime ports. The Founders identified a history and pattern of such discrimination, and they sought to prevent the conduct by binding the States to the Constitution. The Shipping Act, enacted after the adoption of the Fourteenth Amendment, seeks to carry out the intent of the Founders. The court below held that the Fourteenth Amendment was not in issue because Congress had not purported to use it as a basis for the Shipping Act. Petition Appendix at 21a. The Shipping Act does, however, prohibit the disparate treatment of maritime port users. Congress aimed at conduct proscribed by the Fourteenth Amendment. Since the requirements of the Fourteenth Amendment are otherwise met, no reason appears why State-sponsored disparate treatment between port users should go unremedied if there is not a "rational relationship between the disparity of the treatment and some legitimate governmental purpose." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 964 (2000) (quotation marks and citations omitted). The complaining party before the Federal Maritime Commission alleged disparate treatment at the Port of Charleston by the State of South Carolina, and should be allowed to put on proof.

CONCLUSION

The Petition of the Federal Maritime Commission should be granted.

Respectfully submitted,

CHARLES T. CARROLL, JR.
CARL LARSEN TAYLOR *
Wilcox, Carroll & Froelich, PLLC
2011 Pennsylvania Avenue, NW
Suite 301
Washington, DC 20006-1895
(202) 296-3005

Attorneys for Amicus Curiae

* *Counsel of Record*

September 10, 2001